pendently of the Constitution of the United States, belonging to that original legislative power which is vested in the people, which they never have delegated to the General Government, and which they have in the most general and unlimited manner committed to the several state legislatures.

J. H. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

THE PENNSYLVANIA RAILROAD CO. *v.* BOOKS.

In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the employees of the company, made subsequently to the accident, are not competent evidence. Such declarations are only competent as part of the *res gestæ*.

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.

WRIT of error to Common Pleas of *Snyder county*.

The plaintiff was a United States mail agent, employed by the Post-Office Department to take charge of mails on the cars of the defendant company.

While on the train an accident occurred by which he was injured, whereupon he brought an action upon the case for damages.

Plaintiff recovered a verdict, and defendant took this writ of error upon points which sufficiently appear in the opinion of the court.

Miller & Doty and *Cuyler*, for plaintiff in error.

Miller & Parker, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, J.—This was an action by the plaintiff below against the defendants, the plaintiffs in error, to recover damages for injuries alleged to have been occasioned by the negligence of their servants. Nine errors have been assigned, which it is our duty to consider.

The 1st is that the court erred in admitting testimony, touching the habits and competency of the conductor of a coal train, in the employ of the company, which had run into the passenger train and caused the injury. This assignment of error was not pressed, and properly. If by direct evidence it appeared that the conductor was a man of intemperate habits, it would cast upon the defendants the burthen of proving that he was not intoxicated at the time and had used proper care. It is certainly incumbent upon railroad companies to employ none but sober men on their roads. Where a habit of intoxication in a conductor is shown, it raises, in the case of an accident, a presumption of negligence, which stands until it is rebutted.

The 2d assignment of error is, that the learned judge erred in admitting evidence of statements of the flagman made subsequent to the accident. The plaintiff proposed to ask a witness if the flagman showed him how far he had gone back to flag the fast line. This was admitted, and an exception sealed. The rule is well settled, that what an agent says, while acting within the scope of his authority, is admissible against his principal, as part of the *res gestæ*, but not statements or representations made by him at any other time: *Shelhamer* v. *Thomas*, 7 S. & R. 106; *Levering* v. *Rittenhouse*, 4 Whart. 130; *Jordan* v. *Stewart*, 11 Harris 244. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narration of the transaction, in which he had been employed, are not admissible against the principal: *Hugh* v. *Doyle*, 4 Rawle 291; *Clark* v. *Baker*, 2 Whart. 340. Naked declarations, which are not part of any *res gestæ*, are mere hearsay, like words spoken by a stranger: *Patton* v. *Minesinger*, 1 Casey 393. The flagman himself was a competent witness, but his statement of what he had done was clearly

incompetent. There was error, therefore, in the admission of this evidence.

The 3d error assigned is in admitting evidence of statements made by the vice-president of the company. The plaintiff offered to ask a witness what Mr. Lombaert said about the railroad company receiving pay for carrying the mails. This was objected to, but the objection was overruled, and an exception taken. Declarations made by the officers of a corporation rest upon the same principles as apply to other agents. In a case where the admissions of the trustees of a religious corporation were offered in evidence, C. J. TILGHMAN said: "An agent is authorized to act; therefore, his acts, explained by his declarations during the time of action, are obligatory on his principal, but he has no authority to make confessions after he has acted, and, therefore, his principal is not bound by such confessions: *Magill* v. *Kauffman*, 4 S. & R. 321; *Spalding* v. *The Bank of Susquehanna County*, 9 Barr 28. So it has been ruled that in an action by a bank, evidence of the parol declarations of the officers of the bank is not admissible for the defendant, without proof of the particular officer's being authorized by the board of directors to speak for them, even though it should appear that the board kept no regular minutes of their transactions: *Stewart* v. *The Huntingdon Bank*, 11 S. & R. 267. In like manner declarations made by a person, who had been president of a bank, respecting payments made on a note, are not evidence against the bank: *Sterling* v. *The Marietta and Susquehanna Trading Co.*, 11 S. & R. 179; *Bank of Northern Liberties* v. *Davis*, 6 W. & S. 285. The decision in the case of *The Harrisburg Bank* v. *Tyler*, 3 W. & S. 373, does not conflict with these authorities—for the declaration of the cashier was received in that case as evidence that the bank had knowledge of a trust, and it was in the performance of those functions, which peculiarly belong to that officer in the current transactions of its business: *Hazleton Coal Co.* v. *Megargel*, 4 Barr 329. This assignment of error is, therefore, sustained.

The 4th error assigned is, that the learned judge erred in admitting evidence of the number of plaintiff's family, his habits, industry, and economy, as affecting the question of damages. In *Laing* v. *Colder*, 8 Barr 479, it was ruled, in a case of injury to the person, that damages sustained by the plaintiff, from the cir-

cumstance of his being the head of a family dependent upon him, have no necessary connection with the injury. Such damages may or may not follow a temporary bodily disability. Damages of this nature are, therefore, not direct or necessary, but special as being possible only, and must be specially averred to let in evidence of them. It is difficult also to see what bearing the plaintiff's habits, industry, and economy could legitimately have on the damages. They might be important in a proceeding under the Act of April 26th 1855 (Pamph. L. 309),[1] but in an action by the injured party himself they were irrelevant, and tended only to excite feelings of commiseration and sympathy in the breasts of the jurors, and to inflame unjustly the damages—results which in all actions of this character ought carefully to be avoided.

The 5th error is in excluding testimony offered by the defendants below touching the efforts made by them to secure competent train hands. We think the court was right in excluding this testimony. It was no justification or excuse to the company in employing an intemperate or incompetent man in a business involving such peril to life and limb, that hands were scarce. For a sufficiently high rate of compensation sober and competent men are always to be had. Such evidence, if admitted, would necessarily lead to collateral issues far wide of that on trial. We think there was no error in this ruling.

The 6th error assigned is in excluding from evidence the employee's pass, upon which the plaintiff was riding. The ticket produced was in these terms: "Employee's monthly pass. Pennsylvania Railroad Co. Pass S. Books, Route Agent, an employee of the Pennsylvania Railroad Company." The evidence offered was of course to show that the plaintiff accepted and used this ticket. It certainly was an admission by him that he bore to the plaintiffs in error the relation of an employee or servant. It was not indeed conclusive—not an estoppel—if explained so as to show that he was really not in the employ of the company, but, as was alleged, received and used the ticket as a route agent in the service of the post-office department of the government of the United States under a contract between that department and the company for carrying the mails. Standing alone, uncontradicted and unex-

[1] Action by widow or personal representatives for negligence causing death.

plained, the pass would have been sufficient to show that the relation existed between the company and the plaintiff stated on its face, and it was admissible no matter what evidence to the contrary had been previously given. The plaintiffs in error had a right to have the whole evidence go to the jury, as it would then have been a question for them, and could not have been shut out from their consideration, as it was by the judge in his answer to their 7th point. This assignment of error is therefore sustained.

The 7th error assigned is, that the learned judge erred in his instructions to the jury on the subject of damages, and in his answers on the same subject to the ninth and tenth points presented by the defendants below. After laying down a measure, which is not objected to here, and on which, therefore, we give no opinion, he added, "These we think would be fair rules to ascertain the measure of damages the plaintiff would be entitled to in this case; but if you can find any better ones than those suggested you are at liberty to adopt them, as the measure and amount of damages are entirely for you to ascertain, under all the evidence and circumstances in the case." The effect of this language was to leave the measure of damages entirely in the discretion of the jury. The general rule in actions on the case for negligence is that the party aggrieved is entitled to recover only to the extent of his actual injury. In the case of a suit by the party injured himself, it may no doubt include a reasonable compensation for pain and suffering, as well as the expense of medical attendance and the loss of time consequent upon confinement. But in these cases, as well as in those brought under the Act of April 26th 1855, unless the injury has been wantonly inflicted, when exemplary damages may be given, the jury must be confined to damages strictly compensatory. "Injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured and any incurable hurt inflicted." Per BELL, J., in *Laing* v. *Colder*, 8 Barr 481. There was error therefore in this instruction.

The objection to the answer to the 9th point has not been pressed, and very properly. We see no error in it. The 10th point was "that if the court should be of opinion that plaintiff may recover, then the measure of damages would be the pecuniary loss he has sustained

in consequence of the injuries received." The answer was: "This is not the entire measure of damages you can give the plaintiff, if you believe this occurred from the gross negligence of the defendants' agents." The court might with more accuracy and propriety have simply negatived the point, for it was not true, whether the negligence of the defendants' agents was gross or otherwise. There is, therefore, no error in this answer of which the plaintiffs in error have any right to complain.

As to the 8th assignment of error, we think the learned judge was clearly right in his answers to the third, fourth, and fifth points presented by the defendants below. Every one riding in a railroad car is presumed *primâ facie* to be there lawfully as a passenger, having paid or being liable when called on to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser. So as to the 9th error assigned, the employee's pass having been excluded, though we think improperly, there was no evidence that the plaintiff was an employee of the company.

Judgment reversed, and *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

HAYCOCK, ADMR. OF SHIVE, *v.* GREUP.

When specimens of handwriting, admitted or proved to be genuine, are offered to prove by comparison the genuineness of the writing in issue, the comparison can only be made by the jury.

Such evidence is competent only as corroborative of other proof; it is not admissible as independent proof.

On an issue to determine the genuineness of a signature of A., specimens of B.'s writing in which the name of A. occurs are not competent independent evidence to prove by comparison that the signature of A. was written by B. Nor is the opinion of a witness that the signature was not written by A. any foundation for such proof that it was written by B.

Whether such testimony would be competent even in corroboration of other testimony that B. had written the signature in issue, doubted by STRONG, J.

A sealed special verdict so expressed as to be ambiguous may be reformed and moulded by the court in presence of the jury, without sending the jury out to reconsider it.

WRIT of error to the Common Pleas of *Lehigh county*.

Peter Shive, the defendant's intestate, made deposits in the

Dimes Saving Institution, receiving certificates of deposit. After his death suit was brought on these certificates by John A. Greup, who claimed them by virtue of an assignment upon them as follows:—

"For value received, I assign the within note to John A. Greup, this 10th of August 1864. "PETER SHIVE."

The administrators of Peter Shive denied the genuineness of the signature of Peter Shive to these assignments, and suits having been brought against the Dimes Saving Institution, an agreement was entered into, to try the following questions, to wit: 1st, Whether the assignment of the certificates of deposit were in the handwriting of Peter Shive. 2d, Whether the said certificates if so signed by the said Peter Shive were delivered to John A. Greup, during the lifetime of the said Peter Shive. 3d, Whether, if the assignments were so signed and delivered, a valuable consideration passed between the said Shive and the said Greup.

On the trial the defendant offered "to prove the handwriting of John A. Greup, and to establish the genuineness of several specimens in which the name of Peter Shive has been written by said John A. Greup, the plaintiff, in order to submit the said specimens to the jury to compare with the signatures in dispute on this trial, averred to be the signatures of Peter Shive."

This offer the court rejected, whereupon the defendants offered "to prove that the signatures to the assignments are in the handwriting of John A. Greup, and for the purpose of proving this fact, they offer in evidence specimens of the handwriting of John A. Greup, in which he has written the name of Peter Shive, to be submitted to the jury to compare with the signatures to the assignments in suit."

This offer was also rejected. These rulings of the court were assigned for error.

The jury were instructed to find a special verdict, and after deliberation brought into court a sealed verdict in the following words:—

"1. We agreed to detrume wether the assignment of the curtificates of deposits upen wich suut wure brought is in the proper handwritening of Peter Shive their estate.

2. We agreed wether the said curtificuts, is so signed by the said Peter Shive, wether the same were delived to the said John A Greup.

3. We agreed for value during the lifetime of the said Peter Shive. Verdick in favor of the Plentiff."

The court, without sending the jury back to their room to correct their verdict, changed the same at bar, under exception from the defendants' counsel, and asked them whether the following was their intended verdict, to wit:—

"1. That the signatures are in the proper handwriting of Peter Shive.

2. That the certificates were delivered to John A. Greup in the lifetime of Peter Shive.

3. That the same were delivered to John A. Greup for value."

The jury assenting to this the court entered it as their verdict. This action was also assigned for error.

John D. Stiles, for plaintiffs in error, cited *Farmers' Bank* v. *Whitehill*, 10 S. & R. 110; *McCorkle* v. *Binns*, 5 Binn. 349; *Lodge* v. *Phipher*, 11 S. & R. 334; *Travis* v. *Brown*, 7 Wright 9; Greenl. on Ev. § 581. On the matter of the verdict, he argued that the judge should have sent the jury out to reform their verdict, and not altered it himself, citing *Reitenbaugh* v. *Ludwick*, 7 Casey 132, to show the practice in such cases.

John H. Oliver, for defendant in error.

The opinion of the court was delivered by

STRONG, J.—In this state the rule respecting proof of handwriting in civil cases, by comparison of it with other writings admitted to be genuine, or proved to be genuine beyond a doubt, appears to be this: The comparison can be made only by the jury, and it is not allowed as independent proof. It can be used only as corroborative. After evidence has been adduced in support of a writing, it may be strengthened by comparing the writing in question with other genuine writings, indubitably such. Beyond this our cases do not go: *Bank* v. *Whitehill*, 10 S. & R. 110; *Travis* v. *Brown*, 7 Wright 9. And this is a departure from the English rule, which excludes other writings entirely, when offered for the mere purpose of enabling the jury to judge of the handwriting by comparison, for reasons that must be admitted to have great weight. But even under our relaxed rule the evidence offered in this case and rejected was inadmissible. The question at the trial was whether Peter Shive had signed certain assign-

ments of certificates of deposit, purporting to have been made to John A. Greup, the defendant in error. After he had given considerable evidence to show that the signatures were in the handwriting of Shive, and had rested his case, the plaintiff in error called a witness who testified to his belief that the signatures to the assignments were not those of Peter Shive. They then offered to establish the genuineness of several writings in which the name of Peter Shive had been written by John A. Greup, in order to submit them to the jury to compare with the signatures to the assignments. This being rejected, they renewed their offer in another form. They proposed to prove that the signatures to the assignments were in the handwriting of John A. Greup, and as the means of such proof they offered in evidence specimens of the handwriting of Greup, in which he had written the name of Peter Shive, to be submitted to the jury for comparison with the signatures to the assignments. This offer was also rejected.

Up to the time when these offers were made there was no evidence whatever that Greup had forged the name of Shive, or that the signatures were in Greup's handwriting. No witness had expressed such a belief, or intimated a suspicion to that effect. The evidence offered was not then corroborative of anything that had previously been proved, or of anything with which it was proposed to follow it. Assuming, as we do, what does not clearly appear, that the offer was to establish indubitably the genuineness of Greup's handwriting in the specimens, yet, when that was established, they could not have been received until ground had been laid for their introduction by other proof that Greup wrote the signatures to the assignments of the certificates. Were this not so, they would be primary and independent evidence of a fact, when the law declares them admissible only as corroborative. True, when the offers were made, it was alleged that Greup signed the name of Shive, but it was alleged without evidence, and there was, therefore, nothing more than an allegation to be corroborated. The belief of a witness that the signatures to the assignments were not in the handwriting of Peter Shive was not the first step toward proving that Greup wrote them. For myself, I doubt whether if there had been some evidence that the signatures to the assignments were written by Greup, it could have been corroborated by comparison with other specimens of his writing, admitted or clearly proved to be genuine. No case in our books has gone to

that length, and so broad a doctrine has never been asserted. Even then it would have been allowing the jury to draw an inference of one fact, from another fact, itself only an inferential conclusion. For the question in this case was whether Peter Shive wrote the signatures. It is, however, not necessary to decide this.

If the testimony was admissible in this case the plaintiffs in error might have gone on and submitted specimens of the handwriting of other persons A., B., C., and D., indefinitely, specimens selected by themselves, that the jury might determine from comparison whether some one of them had not written the signatures, and therefrom infer that Peter Shive had not. The danger of fraud in the selection of specimens, and the danger of surprise to the opposite party, are too great to warrant the allowance of any such instruments of proof. The 1st and 2d assignments of error are not sustained.

The 3d assignment is, that the court directed a verdict different from the finding of the jury. We do not understand such to have been the fact. The verdict is the one rendered in court, not that which had been sealed up and brought in. The paper brought in by the jury in this case was exceedingly unlettered, but it was a general verdict for the plaintiff below, and without asking an explanation from the jury the court might have moulded it into the form in which the verdict was recorded. The court simply asked an explanation, and it was given in open court. Then the jury declared that they meant to find what the record shows their verdict to have been. In all this we discover no error.

Judgment affirmed.

United States Circuit Court, Southern District of New York.

ARCHIBALD HOPKINS *v.* ALEX. F. WESTCOTT ET AL.

A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice.

Where such a notice stated that the carrier would not be responsible "for merchandise or jewelry contained in baggage, received upon baggage checks, nor for loss by fire, *nor for an amount exceeding* $100 *upon any article,* unless specially

agreed for," &c., the words "any article" mean any *separate* article, not a trunk with its contents. The language bears that construction, and must be taken strictly against the carrier.

Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to $700.

Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller.

In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies.

THIS was an action against an express company for loss of baggage. The following facts were agreed upon:—

The defendants are carriers of baggage in the city of New York.

The plaintiff delivered to the defendants a railroad baggage check to enable them to obtain his trunk at the depot, and deliver the same at his residence in the city, no rate of compensation being named.

The defendants obtained the trunk, but lost it.

Upon the delivery of the check to the defendants, they delivered to the plaintiff a paper upon which the number of the check was indorsed, and which contained also the following printed matter: "The Westcott Express Company will not become liable for merchandise or jewelry contained in baggage received upon baggage-checks, nor for loss by fire, nor for an amount exceeding $100, upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor * * * And the owner hereby agrees that the Westcott Express Company shall be liable only as above." This printed matter, however, the plaintiff did not read at the time it was delivered to him, nor till after notice from the defendants that his trunk was lost.

The general custom of express companies is to charge forty cents for every trunk, and twenty-five cents in addition for every $100 of value beyond $100. Plaintiff was ignorant of this custom.

The defendant was a student at Columbia College, and was proceeding to New York for the purpose of prosecuting his studies at that institution; and certain manuscript books which formed part of the contents of his trunk, were necessary to the prosecution of his studies.

SHIPMAN, J.—It has been remarked by a learned and accurate

writer, "that a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of entry and delivery of parcels, and the information to be given him of their contents, the rates of freight, and the like; as, for example, that he will not be liable for goods above the value of a certain sum, unless they are entered as such and paid for accordingly:" 2 Greenleaf's Ev. § 215. But in the case now before the court, the defence does not rest upon a general notice, constructive knowledge of which the plaintiff is to be charged with by proof that it was generally and widely promulgated. It rests on a special printed notice, put into the hands of the plaintiff at the time he delivered his check to the defendants. It can make no difference that the plaintiff did not choose to read it until after he had notice that his trunk was lost. He received it at the time he parted with his check; it was legibly printed, and he must be charged with actual notice of its contents. By its terms it qualified the duty or liability of the defendants, and limited their responsibility in case of loss to an amount not exceeding $100 for any article, unless the plaintiff should disclose such articles, and have the fact indorsed on the paper, as well as pay for the extra risk. It excluded all liability for merchandise and jewelry. Though, as will be seen in the sequel, this point is of no practical importance in this suit, in view of the construction which I shall give this notice, yet I am unwilling to leave it to be inferred that I entertain any doubt of the power of the carrier to qualify his responsibility by special notice actually given to the owner under circumstances like these. In *The Orange County Bank* v. *Brown*, 9 Wend. 115, Judge NELSON, speaking for the court, says of the carrier: "If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance is paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner must, at his peril, disclose the value and pay the premium." Here, in the case before us, we are not left to a general notice to be charged upon the plaintiff on the ground of its general publication, and which, though he had seen, he might have forgotten;

but the notice was served upon him at the time he sought the services of the carrier. I can have no doubt, therefore, that the plaintiff was bound by the notice, and that the carrier incurred no responsibility which his notice, properly construed, excluded. But here a more difficult question presents itself. The list of the contents of this trunk and the value of each article thereof are agreed to, and they amount in the aggregate to $744.10. It was contended on the argument that the notice limited the liability of the carrier to $100, unless a greater value was disclosed, and that, as no greater value was disclosed, judgment should be rendered for that sum only. But so far from giving this notice a liberal construction in favor of the carrier, I am inclined to construe it strictly against him. The rule which holds carriers to strict responsibility is founded upon high considerations of public policy and the security of the property of travellers. Every limitation of this responsibility should be expressed in each case in clear and unequivocal terms. Notices of this character should, therefore, be construed strictly against the carrier. They are given to travellers of all ages and sexes, in the bustle of rapid transit from one place to another, in crowded vehicles and depots, and they should be free from all doubt or ambiguity, so that their contents should be clearly apprehended at a glance. Now, some portions of the defendants' notice in this case are clear and explicit. It declares that they will not be liable for merchandise or jewelry contained in baggage received upon baggage-checks. No matter what their value, they do not choose to engage in the transportation of such articles as baggage. They further give notice that they will not be liable for losses by fire. Where there is no question of gross or wilful neglect, or recklessness, or malfeasance, or misfeasance, these restrictions being plainly expressed and communicated to the owner at the time of the engagement, without doubt are binding upon him. But after designating merchandise and jewelry, and exempting them, as well as losses by fire, the notice adds: "Nor for an amount exceeding $100 upon any article unless specially agreed for in writing on this check-receipt, and the extra risk paid thereon." The question arises, whether the term "any article" here refers to a trunk or piece of baggage and its entire contents in gross; or whether it is to be confined to each separate article contained therein. In other words, does it limit the liability of the carrier for the loss of a

trunk and its contents, or does it leave him liable for each article contained in the trunk, according to its value, not exceeding $100 for any single item? The terms "merchandise" and "jewelry" refer expressly to articles "contained in baggage received upon baggage-checks"—that is, to the contents of trunks and packages, and excludes liability upon the articles specified. When limiting the liability to $100 upon any one other article, I think it should be held also to refer to the separate contents of the trunks or packages, and not to the whole in gross. This strict construction is in harmony with the policy of the law, and essential to the protection of the community in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unbated. Now I can well conceive that they are unwilling to take the risk of carrying expensive articles of dress, such as costly furs, shawls, and other valuable paraphernalia of an extravagant modern wardrobe, a single item of which is often valued at many hundreds of dollars, without notice of value and pay for the risk. But it may well be doubted whether they intend by such notices as the one under consideration to apprise the owner that they decline all responsibility beyond $100 on each trunk and its contents, unless a special contract is made. A good trunk is worth half that sum, and often more, and the value of an ordinary traveller's trunk and necessary contents would usually exceed that sum. But whatever be the intentions of carriers, they must be so expressed as to leave no room for doubt as to their meaning, or they cannot be permitted to qualify their liability as fixed by the general rules of law applicable to their calling. As was remarked by BEST, C. J., in *Brooke* v. *Pickwick*, 4 Bing. 218, "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies to their office, and at the same time to place in his hands a printed paper specifying the *precise extent* of their engagement." And certainly where they make no oral communication, but merely thrust into the hand of the traveller a small printed ticket, the notice which that contains should be explicit, and leave nothing to be made out by construction. Where there is any doubt as to its meaning, it should be construed strictly as against the carrier.

As to the general custom of express companies to charge extra

for every package over $100 in value, I do not think that has any bearing on this case. Even admitting that they could change their liabilities by a sweeping custom (which may well be doubted), no price was demanded or named in this case, and, therefore, the custom has no bearing upon the controversy. Among the contents of this trunk were five manuscript books, no one of which exceeded in value $100, but the defendants insist that they are not liable at all for these, on the alleged ground that they cannot be properly termed baggage. In *Hawkins* v. *Hoffman*, 6 Hill 589, Judge BRONSON remarks: "An agreement to carry the ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveller usually has with him as a part of his luggage. It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not mean to say that the articles must be such as every man deems essential to his comfort, for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razor, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This, I think, a good test for determining what things fall within the rule." Now, it may safely be said that books constitute to some extent a part of the baggage of every intelligent traveller, and especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law as against the negligence of carriers, as well as any other portions of their luggage.

But, it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded under all circumstances from the list of articles termed baggage. With the lawyer going to a distant place to attend court, with the author proceeding to his publishers, with the lecturer travelling to the place where his engagement is to be fulfilled, manuscripts often

form, though a small, yet indispensable, part of his baggage. They are carried as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey, and, as they are carried with his baggage in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or fishing-tackle. In the present case the manuscript books lost are admitted to be necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed a part of his baggage, for which the defendants are liable. There was one article of jewelry in the list for which, of course, they are not responsible, as all jewelry was excepted by specific designation. This, however, will make no difference with the amount of the judgment, as by the stipulation of the parties it is not to exceed $700, the sum demanded in the declaration, and the aggregate of the agreed value of the list is $744.10. Let judgment be entered for the plaintiff for $700, with costs.

Circuit Court of the United States, Northern District of Illinois.

DION BOURCICAULT *v.* JOSEPH H. WOOD.

Under the Act of 1856 an author who has filed a copy of his title-page but not yet published his play, may have an action at law for damages for the representation of his play without his consent.

A *resident*, in the meaning of the Copyright Acts, is a person *domiciled* in this country, not a mere sojourner.

In an action for infringement of copyright in a play, the copyright and the fact of representation being established, the burden is on defendant to show the author's consent to the representation. Mere publication is not permission to perform it.

A foreigner, resident in this country, who has filed a copy of the title-page of a play, but has not published, is entitled to the protection of the Copyright Laws, but a subsequent publication in a foreign country would be an abandonment of his rights under the Copyright Act of this country.

If there has been no publication at all by the author of a play, he has a right at common law to damages for the representation of his play from a manuscript obtained without his consent.

DION BOURCICAULT, the plaintiff, a foreigner, resided in the United States from 1854 to 1861, and, whilst in New York, composed and took measures to copyright three plays, "*Pauvrette, or the Avalanche*," "*The Octoroon*," and the "*Colleen Bawn*."

He deposited the printed title-page of "Pauvrette" in the clerk's office of the District Court of the Southern District of New York, in September 1858, printed the book in October 1858, and at that time deposited a printed copy of the work, as provided by law, in the same clerk's office.

He deposited the title-page of "The Octoroon" with the clerk on December 12th 1859, and of "The Colleen Bawn" March 23d 1860, and *never printed or published* either of these two.

Wood, the defendant, in 1864, 1865, and 1866, was proprietor of "Wood's Museum," in Chicago, in which at various times during these years he caused the above three plays to be represented without license from Bourcicault.

This was an action on the case to recover damages for the wrongful representation of these plays.

The declaration contained seven counts.

1. A count as to "Pauvrette," alleging the steps taken to secure the copyright, and the infringement.

2. As to "The Octoroon," alleging the deposit of the title-page, and that the play *had never been published* by plaintiff, or with his consent, and the infringement.

3. As to "The Colleen Bawn," substantially the same as the 2d count.

4. A count at common law, alleging that the plaintiff is the author and proprietor of "The Octoroon," a play never published by him nor with his consent, nor ever generally given to the public by him, but still in manuscript, from the representation of which, by his license, he has derived profit. That the defendant, without having been able to do so from any previous representation of it, nor from memory, nor from its production to any audience, but solely from a manuscript copy of it surreptitiously and wrongfully obtained, represented it at various times at his theatre.

5. A count at common law similar to the 4th, as to "The Colleen Bawn."

6. A count at common law as to "The Octoroon," similar to the 4th, with the difference that it alleged that the defendant produced it from a *printed copy* wrongfully and surreptitiously printed by some one unknown to the plaintiff, and without his consent, and surreptitiously obtained by defendant.

7. A count at common law similar to the 6th, as to "The Colleen Bawn."

The plea was the general issue, as provided by statute, and the defences made under it, without and with notice, were:—

1. That at the time he sought to copyright the plays plaintiff was not a *resident* of the United States, within the meaning of the Act of 1831.

2. That no sufficient steps had been taken by him to secure a copyright.

3. That he had not deposited *a printed copy* of "The Octoroon" and "The Colleen Bawn," in the clerk's office.

4. That, to secure his copyright on "The Octoroon" and "Colleen Bawn," *they must have been printed and published.*

5. That Mr. Bourcicault has for years allowed these plays to be performed all over the country, and has permitted printed copies of "The Octoroon" and "Colleen Bawn" to be sold by publishers and booksellers without restraining or prosecuting them, and has, therefore, *abandoned* all his rights to them, if any he had, as well under the statutes of the United States as at common law.

6. That the action (on the case) could not be maintained, the only remedy being in equity.

Joseph P. Clarkson, for plaintiff.

Geo. C. Bates, for defendant.

DRUMMOND, J., charged the jury as follows:—

The Act of 1831 protected the author of any book in the right to print and publish such book, provided he was a citizen of the United States, or a resident therein. The fourth section of that act declared how such author should proceed, in order to make that protection available to him. It declared that he should not be entitled to the benefit of the act unless, before publication, he deposited a printed copy of the title of the book in the clerk's office of the District Court of the district wherein he resided.

The fifth section declared that no person should be entitled to the benefit of the act unless he gave information of the copyright being secured, by causing to be inserted in the copy of each and every edition published, during the term secured, on the title-page or the page immediately following it, a notice of the fact of such

right being secured to him, and the words by which such notice was to be given were specified in that section.

The sixth section of the act provided for the recovery of certain penalties if any person or persons, *after the recording of the title of the book*, should publish, import, or cause to be printed or imported, any copy of such book, without the consent of the person legally entitled to the copyright thereof first had in writing, and a forfeiture in money could be enforced by an action of debt.

The seventh section made the same provision substantially in relation to certain other works, such as a print, cut or engraving, map, chart, or musical composition.

It is apparent from what has been stated in relation to these various sections of the law of 1831, that there was a right of action before the publication was actually made. The fourth section of the act provided that the author of a book within three months from the publication should cause to be delivered a copy of the same to the clerk of the district; but, from what has been already stated, it is clear that a right of action accrued before the deposit of this copy of the book, because the language of the sixth and seventh sections is express, that, if any other person or persons, *from and after the recording of the title of the book*, should violate any of the provisions of those sections, they were liable to an action for the benefit of the author, so that, under the Act of 1831, there can be no doubt that not only a suit in equity, but *at law*, could be maintained before the publication of the work, for the benefit of any party aggrieved.

Turning, then, to the Act of 1856, and construing it by the light thrown upon the subject by the previous Act of 1831, the question is, what rights there are under the more recent statute.

The act was declared to be supplemental to the Act of 1831, and it set forth that any copyright hereafter granted under the laws of the United States, to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right, also, to act, perform, or represent the same, or cause it to be acted, performed, or represented on any stage or public place, during the whole period for which the copyright is obtained.

It will be observed that this act speaks of a copyright being

obtained and granted, but it is clear that it does not necessarily mean that the title of the work shall be deposited with the clerk of the District Court *and publication made*, because that is not the meaning of the term in the original law, to which this is supplemental, as will be seen from what has been already said. The language of the fifth section of the Act of 1831 is, that no person shall be entitled to the benefit of this act, unless he shall give information of the copyright. That section must be construed with the other sections which immediately follow it, the sixth and seventh, and, of course, it is not intended by this language to deprive of his action a party who may be injured between the time of filing the title in the clerk's office and the time of publication. As I have already said, it in terms gives the right of action in such case. Then, this supplemental act does not necessarily mean by the term "copyright being granted," that the book has been published and notice given; otherwise the author of a book, under the Act of 1831, would have a more complete remedy than the author of a play under the supplemental Act of 1856; so that, comparing the two acts together, and construing the latter act by the light thrown upon the subject by the various provisions of the prior act I think we may arrive at a conclusion as to what is the meaning of this clause of the Act of 1856, namely, "and any manager, actor, or other person, acting, performing, or representing the said composition without or against the consent of said author or proprietor, his heirs or assigns, shall be liable for damages, to be sued for and recovered by an action on the case, or other equivalent remedy, with costs of suit, in any court of the United States; such damages, in all cases, to be rated and assessed at such sum not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court having cognisance thereof shall appear to be just;" and it is this: that the Act of 1831 having given a right of action between the time of filing the title of the book in the clerk's office, and the time of publication, the above clause in the supplemental act also gives the right of action.

It seems to me that a little reflection will convince us that that must be necessarily so, and must have been the intention of this supplemental act. It is plain that the reason why the act was passed was, because the prior law did not give sufficient protection to the author of a play. The principal profits derived from

plays are the r representations on the boards of a theatre. Now, it is apparent that if that representation could be made, at any time, without the consent of the author of the work, he would be injured pecuniarily in the profits to be derived from his work, because it is from that source, principally, that the profits are expected to come. The injury, it is apparent, would be just as great, and, in most instances, it may be presumed, greater, by the representation of his play before its publication, than it would after. Take the case of the composition of a dramatic work and notice given, as the law requires, by leaving the title-page with the clerk, and after that is done, the obtaining, by clandestine or surreptitious means, of a copy of that play, and representing it upon the stage of a theatre publicly. That, of course, would be an injury, pecuniarily, to the author. The question, then, is, whether this law did not intend to protect the author against such use without his consent. I think that it did. I think when it says that any manager, actor, or other person who shall represent the composition without the consent of the author shall be liable for damages, to be sued for and recovered by an action on the case, it means as well a representation made before as after publication.

Undoubtedly the Act of 1831 contemplated a publication *after* the filing and deposit of a printed copy of the title-page of the work in the clerk's office, but it did not specify how soon that publication should be made; and, as in this case, there is evidence of the representation of "The Octoroon" and "Colleen Bawn," in various parts of the country for some time past, yet, as there is also evidence showing that for many representations made, compensation was given to the plaintiff, I am not prepared to say that, under the circumstances of this case, he has lost the right of action merely in consequence of the non-publication by him of these plays.

It is conceded that there would be a complete and perfect remedy in a court of equity, and I do not know why there should not be in a court of law. Action on the case means an action brought in a court of law. It is under the words "other equivalent remedy," that the party would have recourse to a court of equity. So that as to the main question of law there is in the case, I think that the action can be maintained.

But of course there are other questions that must be decided in

favor of the plaintiff before he can recover in this case, independent of these questions of law. As you will have seen, gentlemen of the jury, from what the court has already said, before a party is entitled to the benefits of these acts, you must be satisfied that he has brought himself within these provisions. A fundamental principle is, that he must be a citizen or a resident of the United States.

The first question for you to determine is, whether this plaintiff is within this provision of the law. He was not born in the United States, and has never been naturalized. The only question is, is he a resident, or rather, was he a resident of the United States at the time that he filed in the office of the clerk of the court of the Southern District of New York, the titles of the various plays which are in controversy here, namely: "Pauvrette," "The Octoroon," and "Colleen Bawn?" The title of the first was filed on the 2d of September, 1858, the second the 12th of December 1859, and the third on the 23d of March 1860. The question is, whether at the time these acts were done by the plaintiff, he was a resident within the meaning of these Acts of Congress. That is a mixed question of law and of fact. Residence ordinarily means domicile or the continuance of a person in a place, having his home there. Of course it is not actually necessary that he should be the occupant of his own house. He may be a boarder or a lodger in the house of another. The main question in connection with this matter is as to the intention with which the man or person is staying in a particular place. In order to constitute residence it is necessary that a man should go to the place and take up his abode there with the intention of remaining; making it his home, his place of abode. If he does that, then he is a resident of that place, and we speak of this in contradistinction to the case of a person who goes to a place with the intention of remaining there temporarily, or for a short time, without any idea of taking up his abode or making his home there. This question of residence or non-residence is not to be determined by the length of time that the person may remain there. For example—a man may go into a town and take up his abode there with the intention of remaining, and, if so, he may be said to become a resident of that place, although, in point of fact, he may afterwards change his mind, and, within a short time, remove from that place, even within a few months. The question, you will see, that is to be

determined, is the state of mind, accompanied with acts, of the man at the time that he goes to the place and takes up his abode there. So a person may go to a town, and if he goes there with the intention of only remaining for a limited time and of leaving the town, although, in point of fact, he may remain there for a year or more, still it does not constitute him a resident of the town or of the place, because he does not go there and take up his abode with the intention or the purpose which existed in the other case, so that it is not to be determined by the length of time, but by the intention existing in the mind of the person, coupled with acts, which acts and intent are to indicate whether or or not he is a resident of the place.

Applying these rules to the case before you, it is for you to determine whether, under the evidence, this plaintiff has brought himself within the case which I have supposed as necessary in order to constitute a man a resident of a particular place.

The plaintiff came to this country, I think the evidence showed, in 1853. He remained here, pursuing his profession as an actor and an author, until the fall of 1860 or the spring of 1861. He went to New York and took up his abode in New York city, and remained there some years. The question for you to determine is, whether, when he was here pursuing his profession, travelling about the country, from 1853 and so on up until the time that he took up what we may call his residence (without meaning by that such a residence as is spoken of in the Act of Congress) in New York, he came here and continued here and in New York, with the intention of remaining and taking up his abode as one of the people of this country. When he took a house in New York city, as it is claimed there is some evidence to show that he did, did he occupy that house with the intention of remaining in the country? If he did with the intention of remaining permanently in this country, then I think he was a resident within the meaning of the law, although he might have changed his mind afterwards and returned to England.

But you must believe from the evidence that the intention existed at the time, and that he did not at that time intend to return to England, but that his intention then was to remain here, and that this idea of returning to England afterwards arose in his mind; although there is no evidence, really, that I know of, of his actual status in England, only that he has been there since

1860 or 1861, managing a theatre. We only know that by the defendant, and perhaps from another party. We do not know what his intention is, further than may be inferred from these acts. So that, gentlemen, it is for you to determine, under the facts of the case, whether, within this description of the term residence, Mr. Bourcicault was, at the time these titles were filed in the clerk's office in the Southern District of New York, a resident of this country. If he was, then I think he was entitled to the protection of these laws. If he was not, if he was a wayfarer, a sojourner, a mere transient person, then I think that he was not entitled to their protection.

If he was a resident of the United States, then, being entitled to the protection of the law, his rights are to be determined by the law. In relation to the play of "Pauvrette," or what has been called by some of the witnesses, "The Avalanche, or Under the Snow," there does not seem to be any serious controversy. A copy of that play was deposited in the clerk's office on the 6th day of October 1858. So that as to that, if he were a resident, Mr. Bourcicault complied in all respects with the law. It is not claimed but that he did, so far as obtaining a copyright, as I understand. That has been published, by which we mean it has been printed, under the authority of Mr. Bourcicault himself, and the only question would be, whether the conduct of Mr. Bourcicault has been such, in relation to this play, as to deprive him of the protection of the Act of 1856.

As I have already said, he had the right under that act, and the sole right, to print and publish that play. He had also the sole right to act and perform it, or to cause it to be acted, performed, or represented on any stage or public place, and no person could do either one or the other without his consent. The only question, then, in relation to this, is, whether he was a resident, or has consented to the representation of this play of "Pauvrette," or "Avalanche, or Under the Snow," by the defendant. If you are satisfied that he has consented to it, then the defendant would not be liable for the performance of that play.

In relation to this, as in relation to the other plays, you must, of course, be satisfied that the plays performed were the identical plays of which Mr. Bourcicault was the author. It is not necessary that it should be identical word for word, but the idea is that another has not the right to use the work of Mr. Bourci

cault's brain in the construction of a play, without his consent, and the mere alteration of a portion of the language of the play would not deprive Mr. Bourcicault of his protection under the law, provided there was a use of the play in all respects, substantially. I think that there ought to be some affirmative evidence introduced on the part of the defendant, that Mr. Bourcicault, by word or deed, has consented to the performance of this play by the defendant—"Pauvrette" I mean; because it is perfectly clear that the Act of 1856 gave the right to the author not only to perform, but to publish it, and declared that no one should perform it without his consent. The mere fact that it was published did not give others the right to enact it or perform it in a theatre; it must be done with his consent or acquiescence, and there ought to be some evidence that it was so done by the defendant.

As to the other plays, the "Colleen Bawn" and the "Octoroon," there is no evidence that these plays were ever published by the plaintiff in this country, and the only question for you to determine would be, so far as this country is concerned, whether the use of the manuscripts of these plays by the defendant, was with the consent or acquiescence of the plaintiff.

There is evidence tending to show that these two plays were published, that is, printed, and that this publication was made in England. I do not think that would make any difference as to the right of the plaintiff, unless that publication was with the consent of the plaintiff. If these plays were published in England with his consent, after what took place in this country, I think that any American actor or manager would have the right to import these plays from England and use them upon his stage. The question for you to determine is, whether there is any evidence satisfying you that this publication was made with the consent and under the authority of Mr. Bourcicault; I mean the publications that were made in England. You must be satisfied from some evidence in the case that they were published with his consent, otherwise there would not be a right in an actor or manager to import them and represent them in this country. But, if they were so published with his consent, I think they would have that right, because then there is an abandonment of the rights under our laws, and he is placed simply in the position of an ordinary English dramatist, who has made publication of his play in his own country. He does not seek, in other words, to follow up the

beginning of the protection which our law gave him, but resorts to publication in England, instead of publication in this country, where, if he were a resident, he would have the right and would be protected. So that the question for you to determine is, whether he did make the publication in England, and of that I think there should be some affirmative evidence to satisfy you that such is the fact.

This substantially, with one other remark, disposes of the rights of the party under the law in relation to copyright. That law prescribes a particular penalty for the unauthorized performance of a play; in the first instance, not less than $100, and for every subsequent performance $50; leaving a certain discretion with the court upon that subject; "as to the court having cognisance thereof shall appear to be just." In other words, it does not necessarily follow that in all cases the precise penalty fixed to the violation of the law shall be given, but the court is to exercise a certain discretion in relation to the matter.

There is another branch of the case under which it is claimed the plaintiff is entitled to protection, and that is under what is termed the common-law right, irrespective and independent entirely of the statute, and because there has been no publication of the "Octoroon" and "Colleen Bawn" by Mr. Bourcicault, or under his authority. If that be so, then he is entitled to the property in his work, existing in manuscript, and nobody can use it without his consent, and if it is so used, every person so using it is liable to respond in damages to him for such use. You will understand that there is no question raised in this branch of the case in relation to "Pauvrette," because that was published with his consent; and, if he is not protected under the law, he is not protected at all, because, having published it himself, he has given it to the public, and the only shield he has is the law. But if he has not published the other two, then he is protected at the common law in the property of his manuscripts.

It is admitted on the part of the plaintiff that if a play is performed upon a public theatre, and there is a representation of the same from the mere fact of hearing the play performed, that does not constitute a violation of the law. How far that may be true, it is not necessary for me to decide, because the evidence seems to show that these plays were performed some times, at any rate, by means of manuscripts. It is, then, necessary that it should be

shown to your satisfaction that these were used with the consent or acquiescence of the plaintiff.

The question for you to determine on this branch of the case is, whether he has ever published these works, and if he has not, whether the defendant has used them, obtaining them surreptitiously or from any person without his consent. He would have a right to perform his own plays, to authorize their performance, or he would have the right to dispose of his property, either in whole or in part, to any one that he chose. The question for you to determine is, if he has not published these works, if he has so disposed of them or acquiesced in the performance of these works by the defendant. I admit, also, that, conceding that he has not published them, he may also act in relation to them, as to, perhaps, deprive himself of the right of calling upon a person to respond in damages for the representation; that is to say, if he has allowed these plays to be represented throughout the community for a long space of time, without license and without objection, knowing the fact to be so, then I think he may be considered to have abandoned the use of them to the public.

But it must be apparent that it has been done with his knowledge and without objection on his part. That is to say, the facts must exist to indicate that he consented or acquiesced in their performance. Otherwise he is not prevented from claiming his property in these plays. I mean, of course, his property at common law, as has been explained to you.

But you will see that under this branch of the case, there is no limit as in the statute, to the amount of damages; but it simply then comes, if you believe that the defendant is responsible in damages for the representation of these plays, to the question as to the damages which the plaintiff has actually sustained by the use of the plays by the defendant. That is a question of proof, to be determined by the evidence in the case, and in relation to which you are to form your own conclusions. These plays were performed, it appears, "Colleen Bawn" and the "Octoroon," sixteen times—eight times each—by the defendant in his theatre.

It is for you to say, putting the case upon the ground of common-law right, if the plaintiff has been damaged, and to what extent he has been damnified by these representations by the defendant of these plays. As I have already said, there is no question in this branch of the case in relation to "Pauvrette,"

because that was published and his rights there stand upon the statute.

The jury found a verdict for the plaintiff, of $900.

Supreme Court of Vermont.

OAKES AND WIFE v. SPAULDING AND OAKES.

The owner is liable for injury done by an animal which is known to be fierce or dangerous, though it does not belong to a class *ferœ naturæ*.

Where such an animal is the joint property of two persons, one of whom allows the other to have charge of it, both are liable to a person injured.

THIS action was brought to recover damages for an injury to Mrs. Oakes, done by a ram that was jointly owned by the defendants, both of whom had been for a considerable time "aware that the ram had an unusual propensity to butt, and had on several previous occasions attacked and butted persons."

It appeared, without dispute, that the plaintiff, Effigene Oakes, who is the wife of the other plaintiff, while engaged by direction of her husband in driving his cows from the pasture of the defendant Oakes, was, without fault on her part, violently attacked by a ram, and seriously injured.

The testimony on the part of Spaulding tended to show that about two weeks previous to the injury to Mrs. Oakes, the sheep of the two defendants were washed together; and the defendant Oakes, of his own accord on that occasion, and without permission of or consultation with Spaulding, and in his absence, took the ram and put him into the pasture aforesaid (Spaulding having no interest in or control over it), where it remained until the time of the injury to Mrs. Oakes, taking no measures to prevent the ram doing damage—defendant Spaulding, during all that time, being wholly ignorant of the place at, or manner in, which the ram was kept, giving no directions as to his being restrained from doing damage, nor being consulted in respect to the keeping, care, or management of the ram; and not knowing that the plaintiff's cows were being kept on any land belonging to William E. Oakes,—but soon after Oakes so took the ram, Spaulding was informed of it, and made no objections and gave no directions.

The defendant Oakes made no defence, Spaulding only defending.

French and *Edmunds*, for plaintiffs.

Hard and *Shaw*, for defendants.

The opinion of the court was delivered by

BARRETT, J.—Without bringing into consideration other elements of the case at this stage of the discussion, it seems proper, in the first place, to determine what duty and liability the law imposes on the owner of such beast who has knowledge of such propensity and habit in it. And we think the true view is well stated in the opinions, taken together, of Barons PLATT and ALDERSON, in the case of *Jackson and Wife* v. *Smithson*, 15 M. & W. Ex. R. 561. PLATT, B., said, "No doubt a man has a right to keep an animal which is *ferœ naturœ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." Applying this principle in that case, in which such a ram was the subject, ALDERSON, B., said, "In truth there is no distinction between the case of an animal which breaks through the tameness of his nature and is fierce, and known by the owner to be so, and one which is *ferœ naturœ*." In the case of *Brown* v. *Carpenter*, 26 Vt. Rep. 638, a ferocious dog was the subject. C. J. REDFIELD said, "His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority. That is the case often with men, and always liable to be with ferocious animals; as is said by one judge, 'I think sufficient caution has not been used. One who keeps a savage dog is bound so to secure it, as to effectually prevent it doing mischief.'" These expressions convey what this court regard as the true idea of the law on this subject—treating the words "keeper" and "keeps" as referring to the person who is chargeable with the duty of keeping the animal under safe restraint. The origin, development, and application of the law in this respect is well shown in the arguments of counsel and notes, and the opinions of the judges, as the case is reported, in *Card* v. *Case*, 57 E. C. L. R. 622. *Popplewell* v. *Peirce* 10 Cush. 509, is to the same effect. These cases so

fully bring to notice the learning of the subject, that further special references seem not to be required.

As resting on the relation of ownership solely, unmodified by peculiar circumstances, it would be the clear duty of the owner of such animal effectually to restrain it from practising its favorite propensity upon persons who, otherwise, might accidentally, and without fault on their part, be exposed to its assaults. And no distinction can be made as to this duty between sole and joint owners. What is the duty of the *sole* is equally the duty of the *joint* owners; and what is the duty of one joint owner is equally the duty of the other as to third persons, unless the peculiar circumstances of the given case should relieve the one or the other from that duty.

This brings us to inquire whether what is shown in this case thus relieves Spaulding from that duty? In this connection let it be noted that we are not undertaking to decide questions in cases not yet in existence; and so are not deciding what, in supposed cases, might operate to relieve an owner, either sole or joint, from the duty of effectually restraining such an animal. The ram had been kept by Spaulding up to the time of sheep-washing that spring. It is to be inferred that he assented to the washing of the sheep together. It does not appear that the defendant Oakes acted in contravention of any right of Spaulding, as between themselves, as joint owners, in putting the ram into his own pasture, instead of taking it back to Spaulding's pasture. Oakes, in virtue of the joint ownership, had the same right to have the ram in his own pasture as Spaulding had to have it in his; and that right did not depend on expressed permission by the one to the other. In whichever pasture it was, the duty resting on the owner, of its effectual restraint, followed it. They sustained the relation of joint ownership voluntarily, and they thereby became charged with the correlative duty, and such duty rested on each personally. It was the incident result of the relation, that, as between themselves, either might lawfully have the custody of the property, and such custody, as to third persons, as touching the rights and duties springing from ownership, was the custody of both. It enured to the benefit of both with reference to rights of property; it charged both with commensurate duties in reference to it as property. Now it is noticeable that the case does not show that Oakes did anything to prevent Spaulding from having

full co-operation, either by advice, direction, or acts, in the mode of keeping the ram. All that it shows, either by statement or inference, is, that Spaulding did nothing about it after the sheep washing—not so much as to inquire or interest himself to know where, or in what manner, his fellow-owner was keeping the ram. Being an owner of it, and knowing its propensity and habit of doing violence to persons, and being charged with the duty of effectually restraining it, and without protestation or counter-effort permitting it to be in the pasture of his co-owner, and voluntarily remaining ignorant both of the place and the manner in which it was kept, and under these circumstances it committed the alleged act of violence and severe injury, he failed utterly to fulfil the duty resting upon him, and stands as nakedly chargeable with liability for the damage done as if he alone had owned both the ram and the pasture in which the injury was done. To this view of the case the instructions of the County Court to the jury were applicable, and we think they were clearly correct.

The judgment upon the verdict for $1500 is affirmed.

Supreme Court of Michigan.

THE PEOPLE *v.* ROBERT GARBUTT.

Evidence—Insanity.—In a criminal case where insanity is set up as a defence, evidence that a brother of the accused has become insane from a cause similar to that which is claimed to have operated upon the accused, is admissible as having some tendency to prove the hereditary transmission of insane tendencies.

Insanity—Burden of proof in criminal cases.—In criminal cases the burden of proof rests upon the prosecution to establish all the conditions of guilt; and it does not shift to the prisoner where insanity is set up as a defence. In cases of homicide, the jury are to weigh all the evidence, and unless reasonably satisfied, not only that the prisoner committed the act charged, but also as to his criminal capacity and intent, their duty is to acquit.

It does not follow, however, that the prosecution are required to put in evidence of sanity before the defence has introduced evidence of the contrary condition. Sanity being the normal condition of humanity, the prosecution may rest upon the presumption that it exists, until evidence to rebut that presumption has been given.

Drunkenness is no legal excuse for the commission of crime.

Good character of the defendant in a criminal case.—Evidence of the good character of a defendant is always admissible in a criminal case, and when put in, the jury have a right to give it such weight as they think it fairly entitled to. Arbi-

trary rules for this purpose cannot be laid down for their control. In some cases on unblemished good character may not only raise a doubt as against the clearest case upon the other evidence, but may even bring conviction of innocence.

Requests to charge.—Counsel cannot be absolutely precluded from having proper instructions given to the jury, by a failure to hand in written requests before the argument, as desired by the judge. A direction to that effect by the judge ought to be complied with, when practicable; but its observance must rest in professional courtesy.

On exceptions from the Recorder's Court of *Detroit.*

The defendant was convicted in the Recorder's Court of the city of Detroit on an information charging him with the murder of one La Plante. No question was made that La Plante died of a wound from a pistol fired by defendant, but it was insisted on behalf of defendant that it was inflicted by him under circumstances of great provocation, sufficient to reduce the offence from murder to manslaughter; and it was further claimed that he was at the time mentally incompetent of a criminal intent, the reason being temporarily overthrown through the combined influence of intoxicating drinks, the great provocation, and perhaps of hereditary tendencies also.

Sylvester Larned, for the defendant.

W. L. Stoughton, Attorney-General, for the People.

The opinion of the court was delivered by

Cooley, C. J.—[After stating the case, and disposing of some unimportant exceptions.]

The most important questions arise upon the exclusion by the recorder of evidence offered to show the insanity of a brother of the prisoner, and upon his charge to the jury and refusals to charge as requested on behalf of defendant.

Those questions which relate to the discovery and proof of insanity in criminal cases are perhaps the most difficult of any with which courts and juries are compelled to deal. Mental disease is itself so various in character, so vague sometimes in its manifestations, and so deceptive, especially in its early stages, and its causes are so subtle and so difficult to trace, that the most experienced medical men are sometimes obliged to confess that however careful and thorough their investigations, they still prove unsatisfactory, leaving the mind not only in a condition of painful uncertainty upon the principal question whether mental

disease actually exists, but when its actual presence is demonstrated, failing utterly, in many cases, to trace it to any sufficient cause. This fact is very forcibly brought home to us by the conflicting views expressed on criminal trials by careful, experienced, and conscientious medical men, who, regarding the same state of facts in the light of their scientific investigations and actual but diverse experience, are forced to express different views, in consequence of which juries, in these difficult cases, are sometimes left in a state of greater doubt and difficulty, if possible, than if no such evidence had been given. The case of *Freeman* v. *People*, 4 Denio 9, and the more recent and noted case of the forger Huntingdon, are conspicuous instances in illustration of this truth, but others will readily occur to the mind.

The defence sought to show hereditary tendency to insanity on the part of the defendant. That insane tendencies are transmitted from parent to child, there is no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible, either in civil or criminal cases (*McAdam* v. *Walker*, 1 Dow. P. C. 148, 174; Chitty's Med. Juris. 354–5), yet this ruling has since been rejected as unphilosophical and unsound, and it is now allowed to prove the insanity of either parent, or even of a more remote ancestor, since it is well established that insanity sometimes disappears in one generation and reappears in the next: Taylor's Med. Juris. 628–9, and cases cited; Whart. & Stillé's Med. Juris. 85, *et seq.*

In the case at bar it was not claimed that either parent, or any other ancestor, had been insane, but the defence offered to show that insanity had been developed in a brother arising from a cause similar to that which, it was alleged, had induced the destructive act of the defendant; and this fact was sought to be placed before the jury as throwing some light on the defendant's conduct and accountability.

Although this evidence could not be very satisfactory in character, we think it was legally admissible. It is now generally believed that other things besides actual mental disease in the parents may cause the transmission of taints to their offspring, which result in some cases in idiocy or insanity. The children of habitual drunkards are thought to be much more susceptible to mental disease than those of persons whose habits have been cor-

rect and regular, and the medical opinion has been expressed that the children of those who are married late in life are also more subject to insanity than those born under other circumstances: Taylor's Med. Juris. 629. But it sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively from the parentage. Melancholy examples of this fact are presented sometimes in the case of the intermarriage of near relatives. The reasons for this are not fully understood, and cannot be explained. We can only say of such cases, that observation teaches us the existence of a law of nature which cannot be broken with impunity, but the full boundaries, extent, and force of which we are as yet unable to fully comprehend, point out, or explain. But there are other cases where we may be able to discover effects without the ability to point out either the law or the causes which produce them. What peculiar combination of qualities in parents may tend to produce mental perversion, weakness, or disease in children, must for ever remain, in many cases, matter of profound mystery. If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusions, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question, is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject.

The counsel for the defendant requested the court to charge the jury that if they believed the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the offence, the defendant must be acquitted. A doctrine like this would be a most alarming one to

admit in the criminal jurisprudence of the country, and we think the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real it so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognised it as an excuse for crime: *Commonwealth* v. *Hawkins*, 2 Gray 468; *United States* v. *Drew*, 5 Mason 28; *People* v. *Hammill*, 2 Parker 223; *Pirtle* v. *State*, 9 Humph. 663. Whether all the charges given by the recorder on this subject were correct, we do not feel called upon to consider; as the only exception to the charge as given was a general one to the whole charge, which is not sufficient, when a part of it is correct, to raise questions upon other parts.

The defendant's counsel also requested the court to charge the jury that sanity is a necessary element in the commission of crime, and must be proved by the prosecution as a part of their case whenever the defence is insanity. Also, that where the defence makes proof of insanity, partial or otherwise, whenever it shall be made to appear from the evidence that prior to or at the time of the offence charged, the prisoner was not of sound mind, but was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury. These requests were refused.

It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defence, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defence of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defence, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a

preponderance of testimony, that he was incapable of criminal intent at the time the act was done: *Regina* v. *Taylor*, 4 Cox C. C. 155; *Regina* v. *Stokes*, 3 C. & K. 188; *State* v. *Brinyea*, 5 Ala. 241; *State* v. *Spencer*, 1 Zab. 202; *State* v. *Stark*, 1 Strob. 479. These cases overlook or disregard an important and necessary ingredient in the crime of murder, and they strip the defendant of that presumption of innocence which the humanity of the law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered. Thus, in *Regina* v. *Taylor*, *supra*, it is said: "In cases of insanity, there is one cardinal rule, never to be departed from, viz.: that the burden of proving innocence rests on the party accused." And in *State* v. *Spencer*, *supra*, the rule is laid down thus: "Where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act ought to be clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be in order to find a sane man guilty." These cases are not ambiguous, and, if sound, they more than justify the recorder in his charge in the case before us.

The defendant was on trial for murder. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied: 3 Coke Inst. 47; 4 Bl. Com. 195; 2 Chit: Cr. L. 724. These are the ingredients of the offence; the unlawful killing, by a person of sound mind and with malice, or to state them more concisely, the killing with criminal intent; for there can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

These, then, are the facts which are to be established by the prosecution in every case where murder is alleged. The killing alone does not in any case completely prove the offence, unless it was accompanied with such circumstances that malice in law or in fact is fairly to be implied. The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a

part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent.

It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent on the part of the defendant; or enter upon the question of sanity before the defence have controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence. And on the subject of sanity, that condition being the normal state of humanity, the prosecution are at liberty to rest upon the presumption that the accused was sane, until that presumption is overcome by the defendant's evidence. The presumption establishes, *primâ facie*, this portion of the case on the part of the government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty.

This question of the burden of proof as to criminal intent was considered by this court in the case of *Maher* v. *The People*, 10 Mich. 212, and a rule was there laid down which is entirely satisfactory to us, and which we have no disposition to qualify in any manner. Applying that rule to the present case, we think the recorder did not err in refusing to charge that proof of sanity must be given by the prosecution as a part of their case. They are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it with the understanding that although the initiative in presenting the evidence is

taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt. Upon this point the case of *People* v. *McCann*, 16 N. Y. 58, is clear and satisfactory, and the cases of *Commonwealth* v. *Kimball*, 24 Pick. 373; *Commonwealth* v. *Dana*, 2 Met. 340; *State* v. *Master*, 2 Ala. 43; *Commonwealth* v. *McKee*, 1 Gray 61; *Commonwealth* v. *Rogers*, Id. 500; and *Hopps* v. *People*, 31 Ill. 385, may be referred to in further illustration of the principle. See also *Doty* v. *State*, 7 Blackf. 427. The recent case of *Walter* v. *People*, 32 N. Y. 147, does not overrule the case of *People* v. *McCann*, but so far as it goes, is entirely in harmony with the views here expressed.

The only remaining error alleged relates to the refusal of the recorder to charge as requested upon the evidence adduced by the defendant to establish his uniform good character previous to the time of the alleged offence. To understand this refusal it must be known that the counsel for the defendant had previously been informed by the court that any requests to charge the jury should be handed in before he commenced his argument to the jury. In compliance with this direction, seven written requests were handed in, which were appropriately responded to. None of these related to good character. The court, however, in the charge alluded to the proof of good character, coupling it with a caution to the jury not to give too much weight to the statement the prisoner had made in the case, and which must be considered as made under strong temptations to state that which was untrue in his own exculpation. After this charge was given, the court was asked to instruct the jury that they had a right to believe the defendant's statement in opposition to sworn evidence; and this charge was given, with a repetition of the caution above stated. The court was then further requested to charge that, as to good reputation, it is for the jury to consider whether such reputation tends to rebut the presumption of malice. The court refused to give the charge, on the ground that it might mislead the jury without further explanation, which the court did not feel bound then to give.

We infer from the bill of exceptions that the recorder declined to give what he regarded as proper instructions on this point because the request was not handed in at a prior stage of the case. As a legal proposition, however, the refusal could hardly be jus-

tified on this ground. It is undoubtedly proper that requests to charge should be handed in by counsel before they go to the jury upon the facts; and a rule by the court to this effect ought to be regarded as binding by counsel. Fairness to the judge, and common courtesy, would require that such a rule be complied with, that he may have opportunity to carefully weigh his instructions, and to reduce them to writing if he shall so desire. Counsel who should decline to obey so reasonable a request might justly be regarded as wanting in that courtesy which distinguishes the members of the profession generally in their intercourse with each other, and which is especially due from the bar to the judges who endeavor patiently to administer the law with impartiality amid all the difficulties and embarrassments that sometimes surround the trials by jury. Nevertheless the rule cannot be laid down as an unbending rule of law. The necessity for a request to charge will sometimes arise from what has already been charged by the judge. It may become important in order to render more clear and explicit that which he has already stated, but which has fallen short of a complete exposition of the law upon the point to which his remarks have been addressed. And if in any case the counsel should fail to request the court to lay down those familiar rules of law which it is always to be expected will be given in the cases in which they were applicable—such as the necessity of malice in murder, or a breaking in burglary—the defence could not justly be precluded by such omission from having the proper instructions given.

It is quite possible that in the present case counsel took it for granted that the proper instructions would be given on the subject of the proof of character without any request to that effect. With many judges it is a matter of course to give such instructions, and it is to be presumed the recorder would have done so in the present case had it occurred to him as important. But we think the request of counsel did not come too late in this instance, and he was entitled to have the proper instructions given.

We also think the instructions requested were correct in substance, and that the defendant was entitled to them without explanation or qualification. The whole request was that the jury be instructed that they had a right to consider whether the evidence of good character tended to rebut the presumption of malice. That the evidence was admissible in the case was un-

questionable; but it was equally unquestionable that it could have no bearing whatever except upon the question of malicious intent. To refuse the instruction, therefore, seems to us equivalent to holding, or at least to leaving the jury to infer, that the evidence which was lawfully put into the case was immaterial after it was in.

The instruction is often given in these cases that proof of good character is not to be allowed to weigh against evidence which in itself is satisfactory, and Mr. Starkie has said, "it ought never to have *any* weight except in a doubtful case:" 1 Stark. Ev. 75. Such instructions are well calculated to mislead. Good character is an important fact with every man, and never more so than when he is put on trial charged with an offence which is rendered improbable in the last degree by an uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but may bring conviction of innocence. In every criminal case it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give it such weight as they think it entitled to. Chief Justice SHAW has pointed out in the *Webster Case* how important it is in the case of some minor offences, and he adds that, "even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution:" *Commonwealth* v. *Webster*, 5 Cush. 295. In some cases it may have even this great effect.

The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible. We refer particularly to the cases of

People v. *Jenners*, 5 Mich. 305; *Maher* v. *People*, 10 Id. 212; and *Durant* v. *People*, 13 Id. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts and weigh the evidence. The law has established this tribunal because it is believed that from its members, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common-sense view of a set of circumstances involving both act and intent, than any single man, however pure and eminent he may be. This is the theory of the law, and as applied to criminal accusations it is eminently wise and favorable alike to liberty and to justice. But to give it full effect the jury must be left to weigh the evidence and to examine the alleged motives by their own tests. They cannot properly be furnished for the purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist.

Upon a full consideration of this case, we are compelled to say we find some errors in the record, for which the conviction should be set aside, and a new trial awarded.

Supreme Court of Wisconsin.

NATHANIEL W. DEAN, APPELLANT, *v.* WILLIAM CHARLTON, TREASURER, &C., AND OTHERS, RESPONDENTS.[1]

Where a city charter required that all work should be let by contract to the lowest bidder, *held*, that the city authorities could not contract at all for laying the Nicholson pavement, the right to lay it being a patented right and owned by a single firm, and, therefore, the work being one which could not be open to competition.

PAINE, J.—This was a bill in equity to enjoin the sale of the plaintiff's lands for an assessment imposed upon them for paving the streets in front of them with what is known as the Nicholson pavement. It is claimed that the proceedings failed in several

[1] We are indebted for the opinion in this case to the Hon. O. M. CONOVER, Reporter for the State of Wisconsin.—EDS. AM. LAW REG.

respects to comply with the provisions of the charter, in matters so essential as to render the tax void. But another objection is taken, which goes to the foundation of the whole proceeding; and the conclusion to which a majority of the court have come upon that, will preclude the necessity of examining any of the other questions. This objection is based upon the provisions of the charter requiring all work to be let by contract to the lowest bidder, and the fact that the right to lay the Nicholson pavement is a patented right, and was owned for the state of Wisconsin by one firm in the city of Milwaukie. It is said that the charter authorizes a contract only for such work as is open to competition, and that this work was not open to competition, because nobody had any legal right to do it except the one firm that owned the patent. Upon these facts alone the objection seems to me unanswerable. And nothing seems to be necessary, beyond the simple statement of the requirement of the charter as to the mode of letting work, and the fact that this right was a monopoly, to show that the charter is inapplicable to it, and that a contract for this work would be in violation of the necessary implication from its provisions.

Indeed the counsel for the respondent, by their course of argument, seemed tacitly to admit that there was an apparent incongruity in applying the provisions of the charter to a contract for such work as this. And they sought to avoid it in two modes. First, they claimed that if it was clear that the charter could not be applied in such a case; that it would be a mere farce to advertise to let to the lowest bidder work which only one firm had any legal right to do, so that the very object of the charter—to procure the work to be done as cheaply as possible—might be defeated thereby; then it must be assumed that the legislature did not intend the mode provided in the charter to be applicable, and that the work might be contracted for without regard to that mode.

The other mode of avoiding the objection was by proving that the owners of the patent were anxious and willing to sell the royalty, and had offered it for sixteen cents per square yard. And upon this proof it is insisted that the principle of competition was preserved, and the requirements of the charter complied with. I will state, as briefly as may be, why I think neither of these theories overcomes the objection. The first assumes the correctness of the position that the charter cannot be applied to a con-

tract for work the right to do which is a patented monopoly. And it then infers that because the charter is inapplicable, the city had the general power to make the contract, without regard to its restrictions, and that such was the legislative intent. The error lies in this inference. This position was attempted to be supported mainly by the case of *The Harlem Gas Co.* v. *The Mayor, &c.*, 33 N. Y. 309. The counsel on both sides rely upon that case, and it will therefore be proper to examine it carefully to see what position it sustains.

The action was on a contract for lighting certain streets in New York city with gas. The company had by law the exclusive right to furnish gas for that part of the city. The charter required all contracts for work and supplies, beyond a certain limitation in value which this contract far exceeded, to be let by contract to the lowest bidder. The contract for this gas was not so let, and therefore it was claimed to be void. The court held that, inasmuch as the company had the exclusive right to furnish the gas, the provision of the charter requiring the contract to be let to the lowest bidder was inapplicable, and that it would be absurd to attempt to apply the provision in such a case. PORTER, J., says: "In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility." BROWN, J., says: "Had the common council, in place of this condition, invited proposals in the usual form, there could have been but a single offer at best, and the provisions of the statute would have failed of effect, because they were not applicable to such a subject."

The case therefore fully sustains the position of the appellant's counsel, which seems obvious enough in itself, that a provision requiring work to be let to the lowest bidder, is not applicable to a contract for work as to which there can be no competition. And if not applicable to it, of course it can furnish no authority for such contract. And if such a contract is made, it must be sustained, if at all, by authority derived from some other source than such a provision of the charter.

But the court in that case did hold the contract valid, and the city liable, and this branch of the decision the respondent's counsel rely upon to sustain their position, that if the charter was inapplicable, these proceedings should be sustained, whether conducted in accordance with it or not. But the cases are so different in respect to the grounds of that part of the decision, that it becomes inapplicable here. The power to contract for the lighting of the streets of the city was assumed in that case to be one of the general powers of a municipal corporation. Hence, so soon as the court came to the conclusion that the mode of contracting pointed out in the charter was inapplicable in such a case as they had under consideration, they had no difficulty in sustaining the contract under the general corporate power of the city. But here the question is quite different. It is not necessary to inquire whether the city of Madison, by virtue of its existence as a municipal corporation, would have had the power to contract for paving its streets with the Nicholson pavement, at the expense of the city, after discovering that the provisions of the charter enabling it to cause its streets to be paved at the expense of the lots, were inapplicable for that purpose. If it had such power, and had made such a contract binding the city at large, the question would then have been like that decided by the New York court. But here it made no such attempt. It seeks here to charge the expense upon the lots, and this it has no general power to do by virtue of its mere existence as a municipal corporation; but, if done at all, it can only be done under the statutory authority in its charter, and by complying substantially, if not strictly, with all its requirements. So soon, therefore, as we arrive at the conclusion that these requirements are inapplicable and inadequate to a contract for a work, the right to do which is an exclusive monopoly, it ends the question; for there is no general power of the city to fall back upon. I think, therefore, that while the case in New York does show that the contract in this case was outside of the scope of the provisions of the charter, it fails to show any general authority in the city by which it could be sustained, independent of those provisions. In truth, it would seem too late for us now to say that these requirements of the charter are not applicable to contracts for paving streets, for the contrary has uniformly been held by this and other courts: *Myrick* v. *La Crosse*, 17 Wis. 442; *Mitchell* v. *Milwaukie*, 18

Id. 92; *Kneeland* v. *Furlong*, 20 Id. 437; *Brady* v. *New York*, 20 N. Y. 312.

Neither can I see that the other mode of answering the objection is successful. On proof that the owners of the patent were willing to sell the "royalty," as it is called, for sixteen cents per yard, it is said that other parties might have bid, and the principle of competition was preserved. If an arrangement had previously been made, by which the owners of the patent became bound to transfer the right at sixteen cents per yard, and the contracts had been let in pursuance of the charter, for the materials and labor, subject to the condition of obtaining the patent, the principle of competition, so far as the labor and material were concerned, might have been preserved. But even in that case there could have been no competition as to the price of the royalty. So far as that constituted a part of the cost, there was no possibility of introducing this principle at all. But if the method suggested had been resorted to, so as to preserve competition in the labor and materials, perhaps the fact that it could not be preserved as to the comparatively small balance of the expense, would not have avoided the whole. It is unnecessary to determine whether so strict an application of the spirit of the charter would have been required.

But no such method was resorted to. On the contrary, the proposals were for furnishing the materials and doing the work, without anything in regard to the price of the royalty, and without any previous agreement with the owners of it. There could be no competition in this method. The fact that the owners were willing to sell it at sixteen cents per yard, does not show that there could have been. For, assuming that any contractor might have safely relied on the willingness of the owners to sell it at that price,—assuming that the latter, in case they desired to bid for the work themselves, would not use their power over the patent to aid in obtaining the contract, as far as possible, by preventing others from getting it,—assumptions which it would scarcely be safe for contractors to act upon,—still, there could have been no safety in bidding. For, suppose A., B., and C. all bid, none of them making any previous arrangement for the purchase of the royalty. Before the bids are opened, one of them thinking, to get the contract, desiring in good faith to do the work, goes to the owner of the patent and buys the royalty, for that part of the

city where the work is ordered to be done. The bids are opened, and some one else has the lowest bid, and gets the contract. What position would the successful bidder be in, bound under somewhat severe penalties to enter into and complete his contract, and yet with a rival and disappointed bidder having the sole legal right to do the work? Certainly, this shows that no contractor could safely bid, and bind himself in the manner here required, with sureties and stipulated damages for a failure, without in the first place procuring the right from the owners. For, although they might be willing to sell, that very willingness would make it unsafe for him; because some other bidder might step in and secure the right, in anticipation of the opening of the bids. But if any contractor should, before bidding, purchase the right, then nobody except him could safely bid. It seems clear, therefore, that proof merely of the willingness of the owners to sell the right at a fixed price, does not preserve competition. And the result in this instance, if not conclusive, is yet very satisfactory proof of it. There was no bid except that of the owners of the patent.

It has been compared to the case of work ordered to be done with a particular kind of stone, the quarry of which is owned by one who is willing to sell to all alike at a fixed price. Undoubtedly in that case there might be free competition. If the owner of the quarry, before the contract was let, should sell to one bidder enough stone for the work, he might the next day sell as much to another bidder. And if neither of these should get it, he might afterwards sell whatever was needed to such person as did get the contract. Such being the case, any bidder could safely wait until he obtained the contract before making arrangements for his stone. But there is a marked difference in the case of the patent. There the owner having disposed of the right for any particular district to one person, cannot afterwards furnish the same right to any other. This difference destroys the whole force of the illustration, and shows that the safety of bidders would be very different in the two cases.

It seems to me, therefore, a conclusion derivable from the very nature of the case, that competition could not be, and was not, preserved in the letting of this contract; and that it was, therefore, beyond the scope and in violation of the spirit of the charter.